

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-7055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RANDOLPH PHILLIPS,

Plaintiff-Appellant,

-v-

ALLEGHANY CORPORATION,

Defendant-Appellee.

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.-Appellee.
-----x

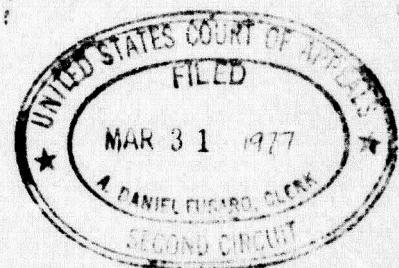
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C/A DOCKET NO. 77-7055

72 Civil 1544

On appeal from Judgment
and Orders Dismissing
Amended Complaint and
Vacating Default Judgment

Frankel, Bricant and
Tenney, District Judges.

B
P/S
BRIEF FOR PLAINTIFF-APPELLANT



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TABLE OF CONTENTS

	<u>Page</u>
<u>ISSUES PRESENTED</u>	2
<u>STATUTES and RULES</u>	3
<u>STATEMENT OF THE CASE</u>	6
<u>The Proceedings Below</u>	11
<u>THE FACTS</u>	14
SUMMARY OF ARGUMENT	16
ARGUMENT	
POINT I.	
THE DISTRICT COURT ERRONEOUSLY APPLIED THE STATUTE OF LIMITATIONS TO BAR THE CLAIMS AGAINST I. D. S.	19
II.	
IN RULING THAT PLAINTIFF'S CLAIM "DOES NOT COME WITHIN THE SCOPE" OF SECTION 64 OF THE NEW YORK GENERAL CORPORATION LAW, THE DISTRICT COURT VIOLATED CPLR 105(c) AND THE CONSTITUTIONAL GUARANTY OF EQUAL PROTECTION.	44

III.

IN DENYING TO PHILLIPS THE BENEFIT OF THE
NEW YORK GENERAL CORPORATION LAW SECTION 64
BECAUSE HE CHOSE TO SPEAK IN COURT IN HIS
OWN DEFENSE IN THE LITIGATION OF ALLEGHANY v.
KIRBY, THE DISTRICT COURT INFRINGED "HIS"
CONSTITUTIONALLY PROTECTED INTERESTS -
ESPECIALLY HIS INTEREST IN FREEDOM OF SPEECH."
PERRY v. SANDERMANN, 408 U.S. 593, 597 (1971)

54

IV.

PLAINTIFF'S "REASONABLE EXPENSES * * *
ACTUALLY AND NECESSARILY INCURRED BY
HIM IN CONNECTION WITH THE DEFENSE" OF
THE DERIVATIVE ACTIONS INCLUDED THE
ACTUAL AND NECESSARY TIME EXPENDED BY
HIM AS ATTORNEY PRO SE

56

V.

JUDGE FRANKEL LACKED JURISDICTION TO VACATE
BY HIS OPINION AND ORDER OF JUNE 15, 1972 THE
DEFAULT JUDGMENT ENTERED AGAINST ALLEGHANY
CORPORATION ON MAY 12, 1972.

60

CONCLUSION

66

TABLE OF CASES

	<u>Page</u>
<u>Alleghany Corp. v. Kirby</u> , 218 F.Supp.164.	6,8,14,17
<u>Austrian v. Williams</u> , 120 F.Supp. 900	20
<u>Cinerama, Inc. v. Sweet Music S.S.A.</u> , 482 F.2d 70 note 2,	27
<u>Denise v. Denise</u> , 110 N.Y.562	23
<u>Dincher v. Marlin</u> , 198 F.2d at 833	25
<u>Harmon v. Peats & Co.</u> , 243 N.Y.473	41
<u>Holt v. Kirby</u> , 383 U.S.902 (1966)	9,14
<u>Krippendorf v. Hyde</u> , 110 U.S.276	20
<u>Local Loan Co. v. Hunt</u> , 292 U.S. 234,	
<u>Martina Theatres Corp. v. Schine Chain Theatres Corp.</u> , 278 F.2d 798	20
<u>Pacific RR Co. v. Missouri Pacific Ry. Co.</u> , 111 U.S. 505	17
<u>Pan Am Match, Inc. v. Sears Roebuck & Co.</u> , 454 F.2d 874.	19
<u>Pell v. McCabe</u> , 256 F. 512,515. (2d Cir.)	20
<u>People of Sioux County, Neb. v. National Surety Co.</u> , 276 U.S.238,241-44, 48 S.Ct.239, 72 L.Ed.547.	21
<u>Smith v. Fitzsimmons</u> , 394 F.2d 381 (2d Cir.1968),	9
<u>Zenn v. Anzalone</u> , 46 Misc.2d 378.	10,12

STATUTES

	<u>Page</u>
Minnesota Indemnification Statute (1969)	4, 5
New York Civil Practice Act	5
New York General Corporation Law	3, passim
New York Civil Practice Law & Rules	6, 48

OTHER AUTHORITIES

Black's Law Dictionary (4th ed.)	56
7 Moore's Federal Practice, par. 60.30(2)	60
Williston on Contracts, s 1016A	57

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BRIEF FOR APPELLANT RANDOLPH PHILLIPS

Plaintiff-Appellant Randolph Phillips submits this brief in support of his appeal, pursuant to 28 U.S.C. s 1291, (1) of an order dated June 15, 1972 of District Judge Frankel, vacating plaintiff's default judgment entered against defendant Alleghany Corporation on May 12, 1972; (2) of an order of District Judge Brieant entered September 25, 1972 dismissing the complaint against defendant Alleghany Corporation; (3) of a MEMORANDUM opinion and judgment of District Judge Tenney dated December 16, 1976 and filed December 20, 1976 dismissing the

complaint against defendant Investors Diversified Services, Inc. (hereinafter sometimes "IDS", and (4) and denying plaintiff's motion to disqualify IDS attorney Richard L. Bond, Esq.

None of the decisions herein has been reported but each is reproduced in the Joint Appendix ("J.A.") at pages at 52a, 59a, 97a, 110a, and 359a. The judgment of December 20, 1976 appealed from is reproduced at 379a.

ISSUES PRESENTED

1. In view of the fact that on June 8, 1972 defendant Alleghany Corporation had filed an appeal to this Court to reverse the entry of the Default Judgment entered in the District Court on May 12, 1972, did Judge Frankel have jurisdiction without first seeking leave of this Court to vacate the Default Judgment on June 15, 1972.?

2. Since Alleghany Corporation on its own motion caused its June 8, 1972 appeal to be dismissed on July 20, 1972, did it not waive thereby any objection to the Default Judgment and is it not a valid subsisting Judgment entitled to be enforced? *

3. Did Judge Tenney erroneously apply the Statute of Limitations as a ground for dismissing the amended complaint against Investors Diversified Services, Inc. ?

* If the answer is "no" the question presents itself whether Judge Brieant's dismissal of the complaint against Alleghany Corporation was erroneous; if "yes" that question is moot.

4. Did Judge Tenney erroneously construe New York General Corporation Law s 64 in concluding that plaintiff-appellant's request for indemnification of his successful defense pro se as a director against an Alleghany stockholders' derivative action was not within the "scope" of the statutes? If the Court was correct in so doing was it correct in also denying him a remedy under other laws and statutes?

5. Was Judge Tenney correct in refusing to disqualify IDS's attorney herein despite the fact that he was selected to oppose plaintiff-appellant by the law firm that had represented plaintiff-appellant with respect to the matters over which he was sued in the above-mentioned derivative action and that law firm had previously represented to the District Court that plaintiff-appellant was entitled to indemnification ?

STATUTES and RULES

Section 64 of the New York General Corporation Law provided in pertinent part:

"Any person made a party to any action, suit or proceeding by reason that he ... is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding ... assessed against the corporation ... upon court order ... except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

MINNESOTA STATUTES**301.095 Indemnification of officers, directors, employees, and agents**

Subdivision 1. A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, wherever brought, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation, as a director, of-

ficer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses, including attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Subd. 2. A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit, wherever brought, by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, of- ficer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the corporation and except that no indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

Subd. 3. To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in subdivisions 1 and 2, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including

attorneys' fees, actually and reasonably incurred by him in connection therewith.

Subd. 4. Any indemnification under subdivision 1, unless ordered by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subdivision 1.

Subd. 6. The indemnification provided by this section shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

NEW YORK CIVIL PRACTICE ACT

"s 16. When action deemed to be commenced. An action is commenced against a defendant within the meaning of any provision of this act which limits the time for commencing an action, when the summons is served on him or a co-defendant who is a joint contractor or otherwise united in interest with him."
Now CPLR 203(b).

"s 48. Time within which actions must be commenced. The following actions must be commenced within six years after the cause of action accrued: * * * (2) An action to recover upon a liability created by statute..."

"s 53. Limitations where none specially prescribed. An action, the limitation of which is not specially prescribed in this article, must be commenced within ten years after the cause of action accrues."

NEW YORK CIVIL PRACTICE LAW & RULES

" s 105. Definitions.

* * *

(c) Attorney. The word 'attorney' includes a party prosecuting or defending an action in person."

STATEMENT OF THE CASE

The case against defendant-appellee Alleghany Corporation

Nature of the case. On May 12, 1972 the Clerk of the District Court entered a default judgment against Alleghany Corporation in the amount of \$94,950, together with interest at 6% from October 13, 1964, amounting to \$42,727, plus \$19.32 costs and disbursements, totaling \$137,696.82. (17a-20a) The Clerk's Certificate noted that Alleghany had neither filed an answer or otherwise moved with respect to the complaint, although its time to do so expired May 10, 1972. *Richard L. Bond, Esq., as attorney for Alleghany, claimed prior thereto to have obtained an ex parte order extending his client's time to answer or move, after being retained on the 19th day of the 20 day period allowed by the rules. But he failed to file his ex parte order with the Clerk or have it timely docketed or served upon plaintiff so that as shown by the Clerk's Certificate of May 12, 1972 it was not recorded in the Clerk's office nor did it reach plaintiff until after entry of the Default Judgment. (17a-20a; 46a, 61a). Plaintiff subsequently

* The complaint alleged breach of an agreement by Alleghany to pay plaintiff the above sum as indemnification for the baseless suit against him as found in Alleghany Corp. v. Kirby, 218 F. Supp. 164. (7a-11a).

observed an assistant clerk docketing the ex parte order on May 15, 1972 but back-dating the entry to May 11 , 1972 (Phillips affidavit, 49 a).

Alleghany then moved under Rule 60(b), without specifying the clause under which its motion was made (21a) for a vacatur of the Default Judgment. Judge Frankel, a former adversary of plaintiff in the Alleghany cases (353 U.S. 151; 355 U.S. 415), granted Alleghany's motion pursuant to a vituperative opinion which merits the rebuke of this Court, and which was filed on June 15, 1972. (32 a). However, without the knowledge of Judge Frankel, Alleghany on June 8, 1972 had filed a notice of appeal to this Court from the Default Judgment. Thus as shown by the cases hereinafter cited (pp. 60-66 ,infra), Alleghany had divested Judge Frankel of jurisdiction to enter the June 15, 1972 order.

Despite the obvious fact that Judge Frankel's order was "null" and "void" because it had been made when jurisdiction had vested in this Court of Appeals and without permission of this Court, plaintiff was unable to cause its vacatur by Judge Tenney to whom the case herein was subsequently assigned on the ground that Judge Frankel's order was the law of the case ! Judge Tenney assured plaintiff by MEMORANDUM filed August 30 , 1974 that he would eventually be able to review the order in this Court. (133 a). And having disposed of a motion to dismiss the complaint against Alleghany's co-defendant Investors Diversified Services, Inc. ("IDS") by MEMORANDUM DATED December 16, 1976 and Judgment entered December 20, 1976, Judge Tenney has made all these matters ripe for appeal. (359 a)

The Case against defendant-appellee Investors Diversified Services.

Since Phillips was a director of IDS when John D. and Clint W. Murchison, Jr., as stockholders of Alleghany Corporation sued him along with Allan P. Kirby, Fred M. Kirby and Charles T. Ireland, Jr., for breach of fiduciary duty and fraud in Murchison et al. v. Kirby et al., subsequently Alleghany Corp. v. Kirby et al., 218 F.Supp. 164, he had a claim for indemnification against IDS under the New York General Corporation Law, s 64, supra), as a result of his successful defense of his acts as IDS director and Alleghany consultant. (218 F.Supp.164, supra).

Donovan Leisure Newton & Irvine as attorneys for Allan P. Kirby and Fred M. Kirby, co-defendants of Phillips and controlling stockholders of IDS, represent to the District Court in Alleghany v. Kirby, supra, that Phillips is entitled to indemnification for his successful defense pro se of his acts in the derivative and related litigations.

In a MEMORANDUM filed in the Murchison action on or about June 21, 1962 the Donovan law firm on behalf of the Kirby defendants and Phillips stated:

"In the case at bar, it is respectfully submitted, that dismissal of Count II should be with prejudice as to all defendants who have appeared and should be upon an order granting defendants Allan P. Kirby, Fred M. Kirby, Charles T. Ireland, Jr. and Randolph Phillips the expenses, including reasonable attorneys' fees, incurred in their defense to date of Count II." (Exhibit A to this affidavit, pp. 7-8) (emphasis supplied) * (171a-172a)

Under date of June 5, 1963 - upon the conclusion of the trial in the Murchison-Alleghany action the Donovan law firm again represented to the District Court that "Defendants have certain right to indemnification and reimbursement..." (Amended complaint, par. 16) (173 a).

Phillips opposes the Donovan Leisure clients the Kirbys in the Supreme Court of the United States (Holt v. Kirby, 383 U.S. 902 (1966) and in this Court (Smith v. Fitzsimmons, 394 F.2d 381 (2d Cir. 1968), and exposes Donovan Leisure

* The representation by the Donovan Leisure law firm that Randolph Phillips was entitled to "attorneys' fees" was and is consistent with N. Y. Civil Practice Act 7 (c) which was in effect during the Murchison litigation. There an "attorney" is defined to include "a party prosecuting or defending (an action) in person * * *." This section is now CPLR 10.1 (c).

partner John E. Tobin's secret ex parte

visit to Friendly, C. J. prior to oral argument

(In re Application of Randolph Phillips (2d Cir.

1975), 510 F.2d 136), and the Donovan Leisure

firm as a General Counsel for Alleghany and

IDS switches its position and delegates a former

associate Richard L. Bond, Esq. to oppose the

application of Phillips for indemnification. *

On the basis of its prior representations and while acting on his behalf, stating that Phillips was entitled to indemnification as above set forth, and because the Donovan Leisure law firm represented Phillips as Chairman of the IDS Finance & Law Committee (312-315a) (306 a) and because his acts as Chairman were on the advice of the law firm and were the basis of the Murchison-Alleghany law suits against him, Phillips asked Judge Tenney to disqualify Bond as the chosen attorney of Tobin of the Donovan law firm to act as counsel here for defendant IDS. The court denied the motion. (364 a).

* Under date of January 28, 1976 The New York Times reported that Owen McGivern, Presiding Justice of the Appellate Division, First Department, of the State Supreme Court was resigning to become "counsel or legal adviser, to Donovan Leisure Newton & Irvine, a firm he was affiliated with from 1937 to 1942." In the Zenn v. Anzalone litigation in which Allan P. Kirby, a Donovan Leisure client with a reputed wealth of \$300 million, was the chief defendant, he approved every application made in behalf of Kirby. (e.g., 17 Misc.2d 897, 191 N. Y. S. 2d 840 (S. Ct. 1959).

The Proceedings Below

The original complaint (7a)

This complaint against defendant Alleghany Corporation was the subject of the Default Judgment entered May 12, 1972. (17a-20a). After Alleghany filed a Notice of Appeal on June 8, 1972 (51a), thereby divesting the district court of jurisdiction to vacate the Default Judgment Judge Frankel without knowledge of the appeal vacated the judgment on May 15, 1972. (52a, 59a). Thereafter Alleghany obtained from Judge Brieant on July 20, 1972 an order dismissing the appeal, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure. It is plaintiff-appellant's position that by first filing the Notice of Appeal and then six weeks later voluntarily obtaining the dismissal of the appeal, defendant Alleghany waived all objections to the claimed irregularity with which the Default Judgment was entered, although plaintiff denies any irregularity, and supports the action of the district court Clerk.

However, following the above events, and maintaining that the judgment had been properly vacated and that Judge Frankel had not lost jurisdiction so to do, Alleghany made a motion to dismiss for lack of diversity the complaint against it. Judge Brieant did not decide nor was he asked to decide the validity of the Default Judgment. On September 25, 1972 Judge Brieant dismissed the complaint against Alleghany. (97a, 110a) It is Phillips' position that the dismissal voluntarily procured by Alleghany of its own appeal on July 20, 1972 terminated the case against it, making the Default Judgment final and the September 25, 1972 order moot.

The amended complaint (143a)

The amended complaint was filed on November 18, 1974, and on the ground that Alleghany Corporation was no longer a party in view of the valid Default Judgment, it named solely as defendant IDS.

Count I alleges a claim under the New York General Corporation Law, Section 64, for "reasonable expenses, including attorneys' fees, actually and necessarily incurred" by Phillips in his successful defense pro se of his acts as a director of IDS and Chairman of its Finance & Law Committee. The allegations include a statement that Phillips 1,899 hours defending him and that he was entitled \$60 per hour by reason of that rate being paid him by Alleghany for 6800 hours of service, or a total of \$408,000 in Zenn v. Anzalone, 46 Misc.2d 378.

Count II alleges the same facts and seeks reimbursement on the theory of agency, loss of time and implied or quasi-contract by IDS which it has breached. The time is placed at 960 hours over 120 days.

Count III alleges the same facts in support of a claim against IDS for unjust enrichment, and based on Minnesota law. *

Count IV alleges a claim in quantum meruit and seeks a recovery of \$57,6000, plus 7 1/2 % interest, compounded annually from June 5, 1963.

* Although not specified in the amended complaint plaintiff by brief and affidavit also claimed a right to indemnification under Minnesota's indemnification statute. (Minn. Statutes, 301.095, supra).

Count V pleads a claim based on the denial to plaintiff as attorney pro se of the Equal Protection of the Law accorded to attorneys-at-law. It also alleges said acts violate his rights under CPLR 105(c).

Count VI on the same facts alleges a denial to plaintiff pro se of the Due Process of Law accorded to attorneys-at-law.

On December 20, 1974 IDS moved for summary judgment, dismissing the amended complaint, after obtaining orders from Judge Tenney vacating plaintiff's notices of deposition. As a consequence no discovery was obtained by plaintiff during the entire period the complaint was pending.

Under date of December 16, 1976 Judge Tenney granted defendant IDS's motion for summary judgment, pursuant to MEMORANDUM filed December 20, 1976. (359a-378a), dismissing the amended complaint, and also denying plaintiff's motion under Rule 11 to strike IDS's answer, and also denying his motion to disqualify IDS attorney Richard L. Bond, Esq. *

The Notice of Appeal herein is from the above-mentioned orders of Judges Frankel, Brieant and Tenney.

* The dismissal of the amended complaint was based by Judge Tenney on the grounds that (1) the claims were barred by the Statute of Limitation; (2) that plaintiff's claim did not come within the "scope" of New York General Corporation Law, s 64; and (3) "choice of law" rules barred other remedies. Prior thereto Judge Brieant dismissed the complaint against Alleghany for lack of diversity. (97a)

THE FACTSThe Default Judgment

The facts with respect to the entry of the Default Judgment have been set forth at pp. 6-7.

The Statute of Limitations

The complaint was filed on April 14, 1972 (1a-2a).

This was less than six-years after the proceedings terminated in the Supreme Court of the United States with respect to review of the decision in Alleghany v. Kirby, supra. (Holt v. Kirby, 384 U.S. 967; and in which Phillips participated as amicus curiae, 383 U.S. 902). The final judgment dismissing the complaint in Alleghany was entered on June 5, 1963. Judge Tenney applied the six-year statute (Sec. 48(2), CPA) from that date in barring Phillips' claim instead of from May 31, 1966 when the Supreme Court proceedings terminated. (384 U.S. 967). Using the latter date his claim was timely commenced in the district court.

However, since Phillips had sued Alleghany Corporation in August 1965 in the State Court and was dismissed in June 1966, Section 16 of the CPA (now CPLR 203(b)) applies, based on the fact that IDS was "united in interest" with Alleghany, and thus the present action against IDS, having been filed in April, 1972 was timely filed based on the application of the six-year statute from June, 1966.

Indemnification

The amended complaint alleges that Phillips spent 1,899 hours of time as attorney pro se over 245 days from September 1960 to April 1963 in his successful defense of his acts as director and Chairman of the Finance & Law Committee of IDS, against the charges alleged against him in Alleghany Corp. v. Kirby, supra.

It is also undenied that Phillips was paid for his services in the prior Alleghany derivative action a fee of \$408,000, or \$60 per hour for 6800 hours for the years 1954 to 1960.

SUMMARY OF ARGUMENT

Defendant Alleghany Corporation waived all objections to the Default Judgment when, after filing the Notice of Appeal therefrom in this Court, it voluntarily procured its dismissal. Its reliance on an order of the District Court granting its motion under Rule 60(b) of the Federal Rules of Civil Procedure, vacating the judgment and procured while the appeal was pending and without the permission of this Court, was erroneous and the order is thus "null and void" for lack of jurisdiction. Weiss v. Hunna, 312 F.2d 711 (2 Cir.1963), cert.den. 374 U.S. 853 (1963); Keohane v. Swarco, 320 F.2d at 432 (6 Cir.1963); 7 Moore's Federal Practice, par. 60.30(2), p. 419.

An order of the District Court granting a post-judgment motion, pursuant to a pre-judgment rule, (Rule 12(b)(1), to dismiss the complaint against Alleghany for lack of diversity jurisdiction was also made without jurisdiction, since plaintiff's appeal was then pending from the order vacating the Default Judgment and no permission had been obtained from this Court to act on the motion. In addition, the issue of jurisdiction was precluded by the doctrine

of res judicata; and in any event since this is "a continuation of the former suit" (Alleghany Corp. v. Allan P. Kirby, Randolph Phillips et al., 218 F. Supp. 164, USDC SDNY) the District Court had "supplemental and ancillary" jurisdiction. Pacific RR Co. v. Missouri Pacific Ry. Co., 111 U.S. 505, cited in Martina Theatres Corp. v. Schine Chain Theatres Corp., 278 F.2d 798, note 1 (2 Cir. 1959); Krippendorf v. Hyde, 110 U.S. 276.

In its denial of plaintiff's motion for an order under Rule 60(b)(4), Fed. R. Civ. P., vacating the District Court orders setting aside the Default Judgment and granting Alleghany Corporation's motion to dismiss, the District Court substituted its own rule of law for that of "the binding precedents" of this Court, which have determined that orders of the District Court entered when an appeal is pending and without permission of this Court are "a legal nullity" which "may be vacated by the court which rendered it at any time." 7 Moore's Federal Practice, par. 60.25(4), pp. 314-315. Accordingly, reversal is required to vindicate the jurisdiction of this Court of Appeals.

In ruling that the amended complaint against defendant IDS was barred by the Statute of Limitations Judge Tenney erroneously failed to conclude that the Statute was not applicable to the claims or if applicable the complaint had been timely filed.

In ruling that plaintiff's claim for indemnification as a result of his successful defense of his acts as IDS director did not come within the "scope" of the New York General Corporation Law, Section 64, Judge Tenney make an inequitable and unconstitutional construction of the statute. A proper reading of the statute requires that plaintiff as attorney pro se be treated on an equal basis as an attorney-at-law by reason of CPLR 105(c) and the requirement of Equal Protection, and that his services be measured in hours expended times a fair rate for them in the same way that the hours and rate of an attorney-at-law is calculated for a successful defense of a stockholders' derivative action. Any other method infringes on plaintiff pro se's First Amendment rights by giving the attorney-at-law the benefit of attorneys' fees when successful while denying the State imposed indemnification benefit to a plaintiff pro se because he speaks in his own behalf rather than through an attorney-at-law.

By reason of the relationships between IDS counsel herein and the Donovan Leisure Newton & Irvine law firm and its prior relationship as counsel to Phillips as an IDS director and Chairman of the Finance & Law Committee of the Board of Directors, said counsel should be disqualified from appearing as IDS counsel here in opposition to Phillips.

IDS should be equitably estopped from opposing Phillips' indemnification since its General Counsel the Donovan Leisure law firm and its Chairman Fred M. Kirby represented to the district court in 1962 that Phillips was entitled to indemnification.

ARGUMENT

POINT I.

THE DISTRICT COURT ERRONEOUSLY APPLIED THE STATUTE OF LIMITATIONS TO BAR THE CLAIMS AGAINST I. D. S.

A. There is no statute of limitations applicable to taxation of the "special costs" assessed under s 64 of the N. Y. General Corporation Law, since in the federal courts such "costs" are merely added to the judgment.

Under s 64 a successful defendant is "entitled to have his reasonable expenses, including attorneys' fees" assessed "upon court order". "An application to the court for an order shall be by motion..." Federal Rules of Civil Procedure, Rule 7(b)(1). A "motion" for an "order" is not an "action" that "must be commenced" within any of the periods set forth in the Statute of Limitations. (Art. 2, N. Y. Civil Practice Act).

Section 48(2) of the Civil Practice Act and which is the basis of the district court's decision refers to "The following actions" that "must be commenced within six years after the cause of action accrued....(2). An action upon a liability created by statute..." Obviously this does not apply to a "motion". *

* The argument here is addressed to Count 1 of the amended complaint, based on the final judgment in Alleghany Corp. v. Kirby, 218 F. Supp. 164. Although not a named party in that action defendant IDS is a party to the judgment and liable for the costs at issue here by operation of law. (see s 64, N. Y. Business Corporation Law). Since Alleghany Corporation is the parent corporation of IDS it is also bound to the judgment by the doctrine of privity. Pan Am Match, Inc. v. Sears Roebuck & Co., 454 F.2d 874.

The statutes cited by IDS are inapplicable

These all refer to "Actions to be commenced..." They do not refer nor were they intended to refer to actions within the scope of an action already commenced. Thus Section 65 of the N. Y. General Corporation Law provides, as shown by its heading, for

" § 65. Application for Payment or
Assessment of Expenses "

Plainly, since this Section also provides that the "Application * * * may be made either (a) in the action, suit or proceeding brought in this state in which the expenses were incurred ", the application here is not an "action to be commenced" within the meaning of the statutes of limitation, but an application within an action already commenced. *

* The fact that this case is labeled a civil action is purely a matter of form, not of substance. Changing the caption would not change the substance. Count I of the amended complaint is merely a motion for the order under Sec. 64 of the New York General Corporation Law specified therein. The form was decided upon simply as a matter of convenience for bringing IDS in as a party in the federal court. The fact that it was not a formal party in Alleghany v. Kirby, supra, is immaterial since the statute provides for assessment of the corporation of which the defendant is a director, in this case IDS..

In Austrian v. Williams, 120 F.Supp. 900 (S. D. N. Y. 1953), apparently the first case decided in the court below under s s 64-68 of the New York General Corporation Law, the application for assessment of attorneys' fees by the successful director defendants was brought on by motion, not by commencement of an "action", which alone is subject to the Statute of Limitations. The Court there (Weinfeld, J.) "will fix the allowances" after "The attorneys for the Trustees...submit further affidavits directed solely to the amount of the allowances..." (p. 907). Clearly such procedure is not the commencement of an "action" subject to the Statute.

The present civil action is nothing more than "a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein..." Local Loan Co. v. Hunt, 292 U.S. 234, 239, and any party whose interest is affected may assert his rights by filing the bill on his own behalf. Krippendorf v. Hyde, 110 U.S. 276, 281, 282. For the jurisdiction "the court originally acquired is not exhausted by the entry of the judgment..." Pell v. M'Cabe, 256 F. 512, 515. (2d Cir.) And the present action is "a continuation of the former suit." Pacific RR Co. v. Missouri Pacific Ry. Co., 111 U.S. 505, 522, cited in Martina Theatres Corp. v. Schine Chain Theatres Corp., 278 F.2d 798, 800, note 1 (2d Cir.) *

* Significantly, defendant IDS has not claimed that any prejudice has resulted to it from the delay in making the application herein.

A "continuation of the former suit" is obviously not subject to the statute.

"This section (s 64) embodies the essential provisions of the present section 61-a providing for the assessment of certain litigation expenses as 'special costs' of a derivative action insofar as that section applies to defendant officers and directors. "New York General Corporation Law, p. 203."

Mr. Justice Harlan (then Circuit Justice) stated with respect to s 64 in Austrian v. Williams, 216 F.2d at 284 (2d 1954):

"It may be that a liability for costs is generally a condition of suit. But the scope of costs in federal courts is determined only by federal law which does not classify the allowances and expenses here involved, (including that to Jonas under the general equity powers of the court 1/) as ordinary allowable costs."

1/ See People of Sioux County, Neb. v. National Surety Co., 1928, 276 U.S. 238, 241-44, 48 S.Ct. 239, 72 L.Ed. 547.

Allowing "a reasonable sum as an attorney's fee...to be taxed as part of the costs" means that "the attorneys' fees should be added to the judgment." People of Sioux County citing Home Life Insurance Co. v. Fisher, 188 U.S. 726. (276 U.S. at 242). "Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." (276 U.S. at 244). *

Adding "costs" to the pre-existing judgment in an action timely filed and completed does not "commence" an action in the federal courts, the sole act that brings into play the statute of limitations. **

* The federal courts "own appropriate procedure" has never required that an "action" "must be commenced" (Art. 2, CPA) in order to have attorneys' fees assessed in a terminated action.

** "As to this objection (of the Statute of Limitations) Judge Earl declared that inasmuch as the case before the court was a proceeding to charge the defendant with the original judgment, the cause of action was not barred unless the judgment was barred..." Hoffenberth v. Nash, 191 N.Y. at 451.

B. Assuming, arguendo, the Statute of Limitations had applied, a prior payment by Alleghany Corporation, which controls defendant Investors Diversified Services, Inc., has taken "the case out of the operation of the statute."

As the record shows, out of a total of 8699 hours of services to Alleghany from 1954 to April, 1963, Phillips received from it a payment of \$403,000 for 6800 hours service for the years 1954 to 1960. (Amended complaint, par. 22; Zenn v. Anzalone, 46 Misc.2d 378 ; J.A. 147a). As shown by his affidavit in Zenn sworn to November 24, 1964:

"Thus I was continuously active from the beginning of 1955 to entry of final judgment herein in June, 1960, in assisting counsel herein to achieve the \$18,000,000.00 or more settlement that is the subject of their application herein; and thereafter from September, 1960 through April, 1963, I successfully defended that settlement from attack. I note that no compensation is being asked herein for the time I spent as defendant in Alleghany Corp. v. Kirby. Rather, I am making this subject to a separate claim against Alleghany Corporation." (Phillips affidavit 6/12/72, Exhibit K)

"(t)he time I spent as defendant in Alleghany Corp. v. Kirby " (some 1899 hours,) Amended Complaint par. 22 (J.A. 147a) is the subject of the present civil action.

Judge Tenney in his MEMORANDUM correctly observed that "The origins of this case reach back several decades." (p. 2). "For some ten years, the subject matter of the lawsuit now on appeal has been before the New York State and federal courts." Alleghany Corp. v. Kirby, 333 F.2d 327 (2d Cir.1964), aff'd on rehearing en banc, 340 F.2d 311 (2d Cir.1965), cert. dismissed, 384 U.S. 28 (1966). "Phillips, plaintiff in the instant case, had not been a party (in Zenn, supra) but acted as a consultant to several of the parties defendant in the settled actions and ultimately received a substantial fee award for those services. * * *" MEMORANDUM, p. 2.

The New York Court of Appeals in Denise v. Denise, 110 N.Y. 562, 567 (1888), stated the principle of law applicable to the above facts:

"The case seems to fall fairly within the principle laid down in Smith v. Valie, (60 N.Y. 106); which was a case founded on a claim for services rendered to deceased during many years previous to his decease. GROVER, J. held there that the claim at any and all times for previous services was an entire account, that but a single action could have been maintained thereon against the defendant, and that a payment upon the balance due the claimant took the entire balance out of the operation of the statute (of limitations). *

* In Harmon v. Peats & Co., 243 N.Y. 473 (1926), the Court of Appeals stated

"According to the allegations of the complaint, as explained by the bill of particulars, the services were rendered during the period commencing in July, 1916, and ending July, 1923. Interest is demanded from the first of August, 1923. The Statute of Limitations, therefore, does not apply." (p. 476, emphasis supplied).

The amended complaint herein demands interest also from the date of termination of Phillips' services.

The legal effect of the payment of \$403,000 by Alleghany to Phillips after the 1965 order in Zenn, which was not opposed by Alleghany,* after his claim for 1899 hours services to Alleghany had been noted by him in his affidavit of November 24, 1964, was with respect to this claim, to "take the case out of the operation of the statute (of limitations)." Thus in Matter of Philippe, 31 Misc.2d 193 (1961) the Court stated:

" * * * If the claim is upon an entire amount so that claimant could have maintained only a single action against the decedent upon the entire claim, a payment upon the balance due will take the case out of the operation of the statute. Smith v. Velie, 60 N.Y. 100, 111; Denise v. Denise, 110 N.Y. 562, 567." (p. 198)

This rule applies to the facts of the present case. It may not fairly be disputed that Phillips in the Zenn fee application proceeding "could have maintained only a single action" against Alleghany upon the entire then accrued claim of 8699 hours of services, and that Alleghany with knowledge of the November 24, 1964 affidavit of Phillips, made "a payment upon the balance due" of 8,699 hours by paying for 6800 hours, following the Zenn fee decision of May 12, 1965 and with the knowledge Phillips would then press his claim for the 1899 hours.

Since Alleghany, under the rule above stated, may not maintain a defense of the Statute of Limitations, clearly IDS by reason of the "sufficient identity" between the two corporations found by Judge Tenney (MEMORANDUM, p. 13 and note 4), may not equitably be heard to do so.

* * * the court adverts to the avowed willingness of Alleghany to pay the Graubard-Brussels-Phillips group \$1,000,000. Also, there is the fact that in the Graubard group is Randolph Phillips, one of the activists in the entire litigation, * * *." Zenn, supra, 46 Misc.2d at

C. The District Court erroneously placed the date of accrual of Phillips' claim at June 5, 1963 instead of after May 31, 1966 when the Supreme Court proceedings terminated.*

1. The lack of availability of "a judicial remedy" against IDS.

Defendant IDS was not a party to the record in Alleghany v. Kirby and the record remained subject to the control and jurisdiction of the appellate courts until at least May 31, 1966 (Holt v. Kirby, 384 U.S. 967). The record included 20,000 pages or more of deposition testimony (218 F.Supp. 164), more than 700 exhibits, and 2,236 pages of trial proceedings. (Record in Alleghany v. Kirby, 333 F.2d 327 (2 Cir.) IDS could not be taxed with knowledge of this record upon which Phillips' s 64 application would have to be based, until its return to the District Court.

As Judge Frank stated in Dincher v. Marlin, 198 F.2d at 833 (2d Cir.):

" * * * a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff" "until he is allowed by law to do the thing as to which the statute is interposed".

Without the court record to tax IDS with, "a judicial remedy" obviously was not "available to the plaintiff" herein.

* Under the six-year statute (CPA s 48(2)) applied by Judge Tenney and based on the accrual date of May 31, 1966, Phillips timely filed his complaint on April 14, 1972.

2. To require Phillips to prove his Application under Section 64 of the New York Corporation Law without the benefit of the record would have deprived both defendant IDS and himself of Due Process of Law.
-

As the Supreme Court stated in Pennoyer v. Neff,
95 U.S. 733, 24 L.Ed. 565:

"To give such proceedings any validity, there must be a tribunal competent by its constitution - that is, by the law of its creation - to pass upon the subject matter of the suit; * * *."

Here the "subject matter of the suit" is the record in Alleghany Corp. v. Kirby, and without it being present in the District Court instead of the appellate courts, the former obviously could not "pass upon" it. Thus Judge Tenney plainly was in error in ruling that Phillips' cause of action accrued on June 5, 1963, upon entry of judgment in the District Court, instead of after May 31, 1966 upon the return of the record from the Supreme Court of the United States. Significantly, this is according to the rule "in the majority of jurisdictions". Thus 51 Am Jur 2d states:

" s 174. Appeals

Inasmuch as an action is deemed to be pending until its final disposition on appeal 7/, in the majority of jurisdictions, it is held that an appeal from a judgment with supersedeas tolls the running of the statute of limitations against the judgment during the pendency of the appellate proceedings. 8/ "

7/ See 1 Am Jur 2d Actions s 91.
8/ 46 Am Jur 2d, Judgments 371.

3. As a matter of law, in view of the policy considerations set forth by this Court in Cinerama, Inc. v. Sweet Music S.S.A., 482 F.2d ,70 note 2, claims for attorney fees should not accrue "until after the merits of a case have been finally determined on appeal".

In the words of Judge Friendly in Cinerama:

"Delaying a decision on counsel fees until after the merits of a case have been finally determined on appeal may place a claim for attorneys' fees in 'much better perspective,' Sprague v. Ticonic National Bank, supra, 307 U.S. at 168, 59 S.Ct. 777; the benefit achieved by an attorney, the skill he has exhibited in obtaining it, and the total hours he has labored are more readily assessable after the appellate process has run its course." (p. 70, note 2).

"The final judgment rule is designed not merely to prevent an appeal on an issue concerning which the trial court has not yet made up its mind beyond possibility of change but also to eliminate the need for separate appellate consideration of different elements of a single claim. The burgeoning loads of the courts of appeals mandate strict adherence to this salutary policy." (p. 70)

By dating the time of accrual to the entry of final judgment on June 5, 1963 because no appeal was taken by Alleghany from the judgment insofar as it vindicated Phillips and giving no consideration to the pending appeals from the judgment by Alleghany with respect to the judgment vindicating Phillips' co-defendants, the District Court adopted a policy whereby appellate consideration of the indemnification claims of all the defendants would come to the courts of appeals at differing times and thus would accrue from

the viewpoint of the statutes of limitations at different times. Thus instead of having one set of appeals on one record at one time with respect to all the applications for indemnification from all the defendants the courts of appeals would be confronted with a number of appeals in the same case on the same subject matter yet at differing times. "The burgeoning loads of the courts of appeals" would seem to mandate, as stated by Judge Friendly, therefore "Delaying a decision on counsel fees" of all the parties "until after the merits of a case have been finally determined on appeal". *

Even though no appeal was taken by Alleghany from the judgment of June 5, 1963 insofar as it vindicated Phillips, still it is not inconceivable that if the judgment as to the other defendants had been reversed and Kirby-Ireland found guilty of the fraud charged in 218 F.Supp.164 by either this Court in 333 F.2d 327 or the Supreme Court in 384 U.S. 28, this might have led to a reopening of the case against Phillips. See Rule 60(b), Fed. Rules Civ. Proc.

The decision of the District Court applying the bar of the statute of limitations fails to give consideration to any of the above facts, and is clearly arbitrary in setting the date of accrual of Phillips' claim as June 5, 1963, instead of upon the conclusion of the Alleghany v. Kirby case in the Supreme Court on May 31, 1966.

* Judge Tenney failed to take note of the fact that Phillips participated as amicus curiae in the Supreme Court appeal. Holt v. Kirby, 383 U.S. 902. Walter R. Mansfield, Esq. was opposing counsel.

4. Neither the district court nor defendant IDS cited any statute, rule, or judicial precedent holding that the statute ran, instead of being tolled, "during the pendency of the appellate proceedings" (51 Am Jur 2d s 174).

"It is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions; neither should it be extended by construction ." "Although the defense of the statute of limitations is a legitimate one it seems to us that there is an element of dishonor involved in the assertion in the case before us." Dee v. State Tax Commission, 13 N.Y.S.2d 722, aff'd 282 N.Y. 617.

The inability of the district court and defendant IDS to cite any authority for the conclusion that the statute ran "during the pendency of the appellate proceeding" (51 Am Jur 2d, Limitation of Actions, s 174), thus violates the rule of New York's highest court in affirming "that a statute of limitations should not be applied to cases not clearly within its provisions; neither should it be extended by construction." Dee, supra, emphasis supplied.

D. The action herein was timely commenced under section 16 of the Civil Practice Act, since defendant IDS is "united in interest" with its parent corporation Alleghany Corporation against whom an action based on the "same transactions and occurrences" was commenced "On or about August 2, 1965".

ANSWER to amended Complaint, par. 78.

The ANSWER of defendant IDS alleges:

"78. On or about August 2, 1965, plaintiff commenced an action against Alleghany Corporation in the Supreme Court of the State of New York (Index No. 12788/1965, inter alia, on account of the same transactions and occurrences complained of herein, which action was dismissed with prejudice by order entered and filed on June 6, 1966." (163a)

These facts, which plaintiff conceded or failed to deny, takes this case out of the operation of the Statute of Limitations in view of section 16 of the Civil Practice Act which reads:

" s 16. When action deemed to be commenced.

An action is commenced against a defendant within the meaning of any provision of this act which limits the time for commencing an action, when the summons is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him."

Since under Judge Tenney's application of the statute this is an action to recover on a liability created by statute and to which a six-year statute applies running from June 5, 1963, the date of the entry of final judgment in Alleghany Corp. v. Kirby, supra, it is

obvious that the state court action was timely commenced, and thus by operation of section 16, CPA (now CPLR 203(b)) so was the present action.

In New York Civil Practice by Weinstein-Korn-Miller the following is stated:

¶ 1502.03. Limitation period for subsequent action.

CPLR 203(b) provides that an action is commenced against a defendant, for the purpose of determining the availability of a defense based on the statute of limitations, when a summons is served on a codefendant who is "united in interest with him."¹⁵ See §§ 203.05, 203.06. Once judgment is entered, however, without service upon a co-obligor, a new cause of action accrues in favor of the plaintiff that may be asserted against the co-obligor pursuant to CPLR 1502.¹⁶ The limitation period for this new cause of action is determined by the residual six-year statute of limitations set out in CPLR 213(1), which is applicable to actions not otherwise provided for in another limitations provision.¹⁷ Since the new action is based on both the original obligation and the judgment, the statute of limitations begins to run when the judgment in the original action is entered.¹⁸

¹⁵ See C.P.A. § 16.

¹⁶ See *Honor Brand Milling Co. v. Robinson*, 278 App. Div. 894, 101 N.Y.S.2d 816 (4th Dep't 1951). Under the Code of Procedure, unless the statute of limitations had run at the time the original action was commenced, it is not available as a defense to a co-obligor. See *Maples v. Mackey*, 89 N.Y. 116 (1882); *White's Bank v. Ward*, 35 Barb. 637 (Sup. Ct. 1862). This result was achieved by viewing the determination of the liability of

the co-obligor as a special proceeding at the foot of the original judgment.

¹⁷ See *Hofferberth v. Nash*, 191 N.Y. 446, 84 N.E. 400 (1908) (applying predecessor of C.P.A. § 53 to action under predecessor of C.P.A. § 1185). See also *Macaulay v. Feind*, 179 N.Y. Supp. 469 (App. T. 1st Dep't 1919).

¹⁸ See *Hofferberth v. Nash*, *supra* note 17; *Honor Brand Milling Co. v. Robinson*, 278 App. Div. 894, 101 N.Y.S.2d 816 (4th Dep't 1951). *

* With respect to the definition of "Judgment" New York Civil Practice by Weinstein-Korn-Miller, par.105.09 states: "The major change from former practice is that the term now also includes the final determination in a special proceeding which was previously denominated a 'final order'. CPLR 411,5011. Thus the state court action above referred to was dismissed by a "judgment".

The judgment in the original state court action was filed on June 6, 1966. ANSWER, par. 78, supra. The complaint herein was filed against Alleghany's controlled subsidiary defendant IDS on April 14, 1972 (), or well within "the residual six-year statute of limitations set out in CPLR 213(1) which is applicable to actions not otherwise provided for in another limitations provision." New York Civil Practice, supra.

Section 64 of the N.Y. General Corporation Law provides that a successful director defendant "shall be entitled to have his reasonable expenses... assessed against the corporation or against another corporation at the request of which he served as such director..." The first corporation here is defendant IDS and the second Alleghany Corporation, defendant in the state court action and the controlling parent of defendant IDS. Since both corporations are defendants against the same claim under section 64 and suit was brought "on account of the same transactions and occurrences" ANSWER, par. 78, they meet the "united in interest" requirement of s 16 of the Civil Practice Act and CPLR 203(b). *

* Recent Appellate Division decisions make clear that it is no longer of consequence that the second co-defendant was not named in the original summons.

"The interests of each in the subject matter of this proceeding are such that they stand or fall together." (Prudential Insurance Co. v. Stone, 270 N.Y. 154, 159 200 N.E. 679, 680.) It is, therefore, clear that they are united in interest. Under the circumstances, even though appellant was not named in the original petition, it was sufficiently informative of the parties involved and of all the issues." Ferry v. Boniface, 350 N.Y.S. 2d 228, 229. Accord: Marshall v. Quinones, 352 N.Y.S. 2d 307, 308.

D. The district court erroneously deprived Phillips of the benefit of the doctrine that "Where there are two remedies for protection of a right, one may be barred and the other not." United States v. Whited, 246 U.S. 552, 564 (1918).

The district court stated in its MEMORANDUM

that

"In their briefs, the parties have discussed the issues both under the law of New York, the residence of the plaintiff and the location of all the legal proceedings with which the instant action is concerned, and the law of Minnesota, the state of incorporation of the defendant... Here the applicability of New York law is clearly established by New York statute and Minnesota case law... *

...The (New York) statute (ss 64-68 General Corporation Law) works as a direct instruction to a New York court to apply the New York indemnification provisions when, as under the circumstances of this case, a plaintiff makes application for his 'reasonable expenses' as described in section 64.

Furthermore, the right established by the statute would seem to be the exclusive means to recovery of such expenses, notwithstanding Phillips's attempts to assert a right of reimbursement under a variety of other legal theories including agency, quasi-contract, implied contract, and quantum meruit. The exclusivity of the statutory remedy, apparent on the face of the statute itself, was confirmed in Bailey v. Bush Terminal Co., 46 N.Y.S. 2d 877 ...aff'd 293 N.Y. 735 ... In Bailey, the court held

"no common law right to recover reimbursement exists, and...in the absence of contract or statute, a director who successfully defends

* The court's MEMORANDUM omitted any notice of the 1969 Minnesota indemnification statute. (Minn.Stat. s 301.095).

an action brought against him by his corporation or on its behalf cannot require the corporation to reimburse him for the cost of his expense (defense?)..." (p.880, emphasis supplied) (370a-371a)

It is true that "no common law right to recover reimbursement exists" in New York, but such a right exists in Minnesota as the MEMORANDUM subsequently recognizes, citing In re E.C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950) (1950). Nor was the action here brought against Phillips "by his corporation" (defendant Investors Diversified Services, Inc.) "or on its behalf". Judge Tenney gets around this difficulty by his footnote 4 holding that "The complex financial relationship between IDS and Alleghany "creates sufficient identity between the two corporations for Bailey to be applied." To deprive a director of the common law right to reimbursement accorded by the Supreme Court of the State of Minnesota, the state of incorporation of IDS, because the corporation has a "sufficient identity" with a different and legally separate corporation where no such right exists for its directors, is an unprecedented and illegal, indeed unconstitutional, deprivation of Phillips' rights. No authority was cited by the district court for its ruling. Nothing in New York law justifies it.

Thus Judge Tenney was in error in concluding that "The sole law to be applied to this action by a court in New York is the indemnification portion of the General Corporation Law." (p.13) On the basis of this error he then barred plaintiff's claims under New York law and ignored his other claims. He thus violated long-established rules of law, as shown hereafter.

In United States v. Whited, 246 U.S. 552 (1918) the Supreme

Court stated:

" This doctrine that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in Lamb v. Clark, pp. 193, 198, it was tersely stated as then familiar doctrine that 'If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.' And the principle has frequently been recognized by this and other courts. Lewis v. Hawkins, 23 Wall. 119, 127; Hardin v. Boyd, 113 U.S. 756, 765; Kirkman v. Philips' Heirs, 7 Heisk. 222, 224; Ivey's Administrator v. Owens, 28 Alabama 641, 649; Ganley v. Troy City National Bank, 98 N. Y. 487, 494. " (p. 564).

The doctrine was summarized in Williams v. Flagg Storage Warehouse Co., 128 Misc. 566 (1927):

"Where there are two remedies for protection of a right, one may be barred and the other not. (United States v. Whited, 246 U.S. 552, 564 (1918), cites the Ganley case.)" (p. 572). Also see King v. King, 218 N. Y. S. 2d at 232.

Thus if the District Court was correct in barring Phillips' remedy under the General Corporation Law of New York, nevertheless his cause of action was not barred under the above doctrine insofar as based on the law of Minnesota.

New York has no Statute of Limitation that bars a common law action for indemnification of a corporate director who successfully defends himself in litigation. Accordingly, the common law claim in Count III of the amended complaint falls within s 53 of the Civil Practice Act *, the 10-year statute, and thus is not barred.

* " s 53. Limitation where none specially prescribed. An action, the limitation of which is not specially prescribed in this article, must be commenced within ten years after the cause of action accrues."

Judge Tenney however chose to apply New York law but then since he found Phillips' claim barred and not within its scope he failed to examine that claim under Minnesota law, an application which we think he was duty-bound to make. Not only does Phillips have a remedy under the common law of Minnesota, he also has one under the statute law. (pp. 4-5, supra).

Under familiar "choice-of-law" principles Minnesota would seem to have the strongest interest in the resolution of the particular issue presented", George v. Douglas Aircraft Co., 332 F.2d 73 (2 Cir.1964), quoting Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963). New York's only interest is that of the forum state and because of Phillips' citizenship. This interest is purely happenstance. Minnesota on the other hand is the State of Incorporation of IDS, with its thousands of employees; it is the source of the common law of indemnification for directors of Minnesota corporations, there being admittedly no analogous common law in New York. Minnesota is the situs of the Finance & Law Committee, of which Phillips was Chairman and in which role as well as director he was sued, and IDS is a \$9 billion dollar financial complex, a fact which gives it "the strongest interest" as a Minnesota corporation in the protection of its executive personnel by indemnification and from baseless suit. By comparison New York's "interest" is merely forensic and transitory.

Assuming, arguendo, that the present proceeding is an "action", as found by Judge Tenney, the ten-year statute of limitations applies since it is in equity. *

Alleghany Corp. v. Kirby et al. was instituted as a derivative action sub nom. John D. Murchison et al v. Kirby et al., 218 F.Supp. 164 and sought equitable relief. In addition Phillips was sued for alleged violation of his duties as a fiduciary. Section 53 of the Civil Practice Act applies to every form of equitable action. Dodds v. McColgan (1929), 134 Misc.518, 235 N.Y.S. 492; Pitcher v. Sutton (1933), 238 A.D. 291, 264 N.Y.S. 499; 215 N.Y.10. **

While in New York directors have no common law right to indemnification as directors of New York corporations (Bailey v. Bush Terminal Co. , 46 N.Y.S.2d 877 (Sup.Ct. N.Y.Co.1943 aff'd, 267 App.Div.899, aff'd 293 N.Y.735); directors of Minnesota corporations have such a right at common law based on their fiduciary status. In re E.C. Warner Co., 232 Minn.207, 45 N.W.2d 388 (1950). In this case the Supreme Court of Minnesota upheld a

* On the assumption, arguendo, that the District Court's decision on Count I of the amended complaint is correct, the argument herein made applies to Counts II, III, IV and V.

** "The right of a stockholder of a corporation to bring suit to enforce, for the benefit of the corporation, a cause of action which belongs to the corporation, is purely equitable." Koral v. Savory, Inc., 276 N.Y.

right of indemnification because, when sued, directors had "a fiduciary duty to stand their ground" (45 N.W.2d at 353). In view of this fiduciary duty their claims for compensation when vindicated, since vindication benefits the corporation (Id.), are enforceable solely in equity.

"(Equity is) that part of the law which * * *
(1) administers trusts, mortgages and other fiduciary obligations." Chute, Eq. 4, Black's Law Dictionary,
(4th ed.), p. 634.

And as stated by Judge Moore in City of Detroit v. Grinnell Corporation,
(2d Cir.1974), 495 F.2d 448, 469:

"Allowance of such costs (expenses and counsel fees) in appropriate situations" has been called "part of the historic equity jurisdiction of the federal courts."
Sprague v. Ticonic National Bank, 307 U.S.161,164".

In addition, it is clear that Count III, insofar as it is based on a claim of "unjust enrichment" "is in its nature a substitute for a suit in equity". Herman v. Gleason, 126 F.2d at 940. "and it is to be determined by the application of equitable principles." (Id.) Federal jurisprudence has long included the remedy of a bill in equity to recover for "unjust enrichment". Myers v. Hurley Motor Co., 273 U.S.18, 47 S.Ct. 277, 278, 71 L.Ed. 515. Nash v. Towne, 72 U.S. (5 Wall.) 689 (1866). (pp. 695, 702).

Accordingly, the claims in Count III of the amended complaint based on the common law of Minnesota and the doctrine of "unjust enrichment" are not barred since the ten-year statute of limitations (s 53, CPA) applies to every form of equitable action. Dodds v. McColgan, supra, including a claim herein invoking Sprague.

F. The cause of action herein was timely commenced under the
1969 Minnesota indemnification statute.

Although not mentioned in the complaint the statute was put in issue by the briefs below based on the undenied facts in the complaint constituting a claim thereunder. The presence of this statute like the presence of the Minnesota common law of indemnification overcomes the rule set forth in Bailey, supra. Nevertheless Judge Tenny ignored the statute, in favor of his theory of the "exclusive" nature of s 64 of New York's General Corporation Law. This was error for the reasons set forth in United States v. Whited, infra, 246 U.S. 552, 564; and Ganley v. Troy City National Bank, infra, 98 N.Y. 487, 494. It also violates the rule of United States v. Borden, 308 U.S. at 198 that

"When there are two acts upon the same subject,
the rule is to give effect to both if possible."

Act one here is the New York General Corporation Law, s 64, and act two the 1969 Minnesota indemnification law. The Minnesota law provides for indemnification for "any person who was...a party...to any...completed action...wherever brought...by reason of the fact that he ... was a director, officer, employee, or agent of the corporation...against expenses, including attorneys' fees..." (Minn. Stat. s 301.095, Subdivision 1).

On June 7, 1969, when this statute was enacted, Phillips met all these qualifications.

Subdivision 3 of the Minnesota statute provides that "To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits...in defense of any action... referred to in subdivisions 1 and 2...he shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection therewith." Subdivision 6 provides that the "Indemnification provided by this section shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors and administrators of such a person."

By reason of the above-quoted statutory language there can be no question that the statute applies to the claim herein and makes Phillips' indemnification mandatory. (Subd. 3)

Phillips' cause of action under this statute accrued with its enactment on June 7, 1969. Since September 1, 1963 New York's Statute of Limitations for an action to recover a liability created by statute is three-years. (New York CPLR s 214(2)). Thus Phillips' right of action under the 1969 Minnesota indemnification statute expired on June 7, 1972. His complaint herein was filed on April 14, 1972, well within the statutory limit. It was therefore error for Judge Tenney to dismiss the complaint.

G. Count IV of the amended complaint, sounding in quantum meruit, is not subject to the Statute of Limitations since interest is demanded from the termination of the services to date.

Harmon v. Peats Co., 243 N. Y. 473.

Harmon was an action to recover the value of "work, labor and services" allegedly rendered at defendant's during the years 1916 and 1923 on which a balance remained due of \$13,500 with interest thereon from the first day of August, 1923. In the words of the New York Court of Appeals:

"The complaint in the present case is framed in a double aspect. It is broad enough to permit a recovery on an express contract or on quantum meruit. So far as the contract is concerned, the Statute of Frauds or the Statute of Limitations would be relevant but not if a recovery is sought on quantum meruit. Treating the action as one to recover on quantum meruit the Statute of Frauds could not apply.

According to the allegations of the complaint, as explained by the bill of particulars, the services were rendered during the period commencing in July, 1916, and ending July, 1923. Interest is demanded from the first of August, 1923. The Statute of Limitations, therefore, does not apply. (476)

Count IV of the amended complaint herein seeks recovery for services and interest in approximately similar circumstances and thus is not barred by the Statute under Harmon.

H. Defendant IDS "failed to sustain the burden, cast upon (it) by virtue of (its) conceded status" as a foreign corporation "of demonstrating (its) presence within the State of New York for such periods of time as to prevent the tolling of the statute (CPLR 207; Civ. Prac. Act, § 19)." Beresovski v. Warszawski, 28 N.Y.2d 419, 422.

Defendant IDS, as a corporation admittedly incorporated in the State of Minnesota, with its principal offices there (Amended complaint, par. 2; Answer, par. 2), is subject to § 19 of the Civil Practice Act (now CPLR 207). Its "absence from the State is implied from (its) residence without the State, and (it has) the burden of proving (its) residence in the State for a sufficient time to bar the action." Beresovski, *supra*, 426-427.

Defendant IDS made no attempt below to sustain "the burden of proving (its) residence in the State for a sufficient time to bar the action." Nor is there any such evidence in the record. And since plaintiff was denied any discovery he may not be taxed with failure to develop it. "Zenith was never unambiguously called upon to submit a formal plea (that the statute of limitations was tolled); to hold under such circumstances that want of a submission amounts to a waiver would be to treat pleading as 'a game of skill in which one misstep by counsel may be decisive to the outcome' -

an approach we have consistently rejected. (citing cases)." Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 334-335.

The failure of defendant IDS, after five years, to plead its presence in the State or to offer any evidence to sustain its burden under Beresovski warrants denial of its defense of the statute of limitations.

Defendant IDS's "repeated failure (over five years) to cure deficiencies" in its Statute of Limitations defense "by amendments previously allowed" and "undue prejudice" to plaintiff requires that leave to amend its answer so as properly to plead the bar of the Statute, should be denied. Foman v. Davis, 371 U.S. 176, 182.

Since September 1, 1963 the Statute of Limitations for commencing an action of this nature, is three years, accepting Judge Tenney's classification of an action to recover upon a liability created by statute (CPLR 214(2)). Counsel can hardly urge the statute as a bar when he has slept for five years on his rights properly to plead and prove the bar against plaintiff's claims.

I. Count V of the amended complaint, which seeks a Declaratory Judgment, is not subject to the Statute of Limitations.

See par. 213.02, New York Civil Practice by Weinstein-Korn-Miller.

II.

IN RULING THAT PLAINTIFF'S CLAIM "DOES NOT COME WITHIN THE SCOPE" OF SECTION 64 OF THE NEW YORK GENERAL CORPORATION LAW, THE DISTRICT COURT VIOLATED CPLR 105(c) AND THE CONSTITUTIONAL GUARANTY OF EQUAL PROTECTION.

Judge Tenney stated in this respect

"Second, Phillips's own services as attorney pro se do not qualify as 'reasonable expenses, including attorneys' fees' for which the statute permits reimbursement. * * *

Plaintiff's claim also fails because it does not come within the scope of the statute. Section 64 of the New York General Corporation Law provided that 'a director, officer or employee of of a corporation' was entitled to reimbursement for 'his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him' in the defense of the actions covered by the statute (emphasis added). In discussing the purpose of this provision, the New York Court of Appeals made it quite clear that the statute was intended to alleviate the burden placed on corporate directors and officer by large attorneys' bills. The court stated that section 64 was passed to change the common law rule by which

"the corporation in whose behalf a stockholder's suit is brought, was not obligated... to pay legal fees incurred by directors in defending themselves as individual defendants in such an action. That left corporate directors (and officers) in an unsatisfactory position, since when sued and although successful in a stockholder's suit, they would find themselves exonerated from fault but subject to the heavy attorneys' fee characteristic of the defense of such actions..." Schwarz v. General Aniline & Film Corp., supra, 305 N.Y. at 400...

"Phillips was not subject to any such 'attorneys' fees.' He received no bill for an attorney's services." MEMORANDUM, pp.14,15-16. (373a-374a)

Schwarz, however, did not decide any issue in the present case, the sentence quoted by Judge Tenney is not even dictum but an historical summary preliminary to deciding that a corporate director who successfully defends himself in a criminal proceeding has no right of indemnity under s 64 which applies solely to a civil action. Thus Schwarz is neither precedent nor authority for the decision here. The erroneous standard requiring pre-payment of attorneys' bills.

In reading s 64 to require receipt of a "bill for an attorney's services" in order to qualify for indemnification, Judge Tenney ignored numerous decisions that point the other way. Thus in 1st Iowa Hydro-Electric Co-Op v. Iowa Illinois Gas & Electric Co. (8 Cir.1957), 245 F.2d at 632 the Court stated:

"The provisions of the Clayton Act (15 U.S.C. s 15) provide for recovery of an attorney's fee in addition to treble damages but the right accrues to the party injured and not to his attorney. 32 West Randolph Corporation v. Blackmun, 7 Cir., 222 F.2d 54; Strickland v. Sellers, D.C. Tex., 78 F.Supp. 274." (emphasis supplied)

And Mr. Justice Cardozo in Smith v. Jessup, 223 N.Y. 203, stated:

"The question remains whether the services were beneficial to the preservation of the trust. We have no doubt that they were. Mr. Smith had been named in the will as a trustee. He owed a duty to the estate to stand his ground against unjust attack. * * * Plainly, such services if paid for by the trustee personally, would justify reimbursement

on his accounting before the surrogate.* * *
But reimbursement on an accounting before
the surrogate presupposes payment in advance.
There must therefore be some other remedy
where such payment is impossible. If that
were not so, there would be no safety either
for an indigent trustee or for the estate
committed to his care. The law is too far-sighted
to invite such consequences." (emphasis
 supplied).

Finally, in Colpan Realty Corp. v. Great Am. Insur. Co., 373 N. Y. S. 2d
 802, the Court stated:

"There remains for consideration defendant's
 contention that the complaint fails to state a
 cause of action. The basis of this contention is
 that plaintiff fails to allege it has paid attorneys'
 fees or incurred an obligation therefor. The
 Court cannot accept the argument. If defendant
in fact is obliged to pay for the legal expenses
involved it must pick up the tab whether plain-
tiff paid it or not. There is no logical reason
 to require plaintiff to advance money it is not
 obligated to pay as a condition for obtaining
 payment from the party responsible for the ob-
 ligation in the first first place. It suffices that
 the obligation has been incurred. It should be
 met head on by the responsible party without
 being first siphoned through the plaintiff." (p. 805)
 (emphasis supplied)

Thus clearly by the above standards Phillips did not have to incur
 an actual out-of-pocket expense in attorneys' fees in order to obtain
 the benefit of the indemnification statute. Schwarz, supra, did not
 so decide. Yet Judge Tenney gave no other source as the authority
 for his conclusion herein.

Since Judge Tenney found that "Phillips had a right of recovery
 at the conclusion of Alleghany Corp. v. Kirby" under New York

General Corporation Law s 65(b) (MEMORANDUM, p.15; a), and since defendant IDS "in fact" therefore "is obliged to pay for the legal expenses involved it must pick up the tab whether plaintiff paid it or not" (Colpan Realty Corp., supra). This is because "the right accrues to the party injured and not to his attorney" (1st Iowa Hydro-Electric Co-Op., supra) and because "there would be no safety either for an indigent trustee" if there had to be "payment in advance" to an attorney in order to obtain indemnification. (Smith v. Jessup, supra).

The decision of Judge Tenney is especially inequitable since his attention was called to the record in Phillips v. Murchison, 61 Civil 713 (S. D. N. Y.) in which Phillips disclosed that "by reason of his being unable to collect" his fee for services in Zenn v. Anzalone, because of the interposition of the Alleghany v. Kirby litigation, he "was forced to go into debt for more than \$50,000." (Affidavit sworn to November 1, 1965, par. (xviii). (Record, 2d Cir., Docket No. 30615)

Thus Phillips had to carry a burden throughout the institution of the litigation from September 8, 1960 through June 5, 1963 when it ended as to him, only to be followed by a delayed fee award in Zenn v. Anzalone, (46 Misc. 2d 378) in May, 1965. This heavy \$50,000 burden placed him in the position of the "indigent trustee" referred to by Mr. Justice Cardozo in Smith v. Jessup, supra.* And certainly in the class of vindicated directors entitled to financial relief.

* Phillips' "burden" - to use Judge Tenney's term - was double: not only did he have to carry \$50,000 in debt but he had to invest 120 days and 960 hours of his time without compensation.

Since under CPLR Section 105(c) "The word 'attorney' includes a party prosecuting or defending an action in person" the words "attorneys' fees" in s 64 of the New York General Corporation Law mean both an attorney-at-law's fees and an attorney pro se's fees.

It seems apparent that by this enactment New York State intended to extend to an attorney pro se the same rights and protections of an attorney-at-law except the right to represent other persons. Any other construction would be in derogation of the Equal Protection of the Law clause of the Fourteenth Amendment. Significantly enough, although CPLR Section 105(c) and this argument was called to the attention of the District Court it preferred to ignore ruling on it.

Equal Protection requires that "all similarly situated" claimants "within the class" shall be "dealt with according to uniform rules." Oliver Iron Co. v. Lord, 262 U.S. 172, 179. CPLR Section 105(c) places "within the class" of "attorney" both attorneys pro se and attorneys who represent others. Phillips was "similarly situated" to all other attorneys whose fees are payable under Section 64 of the New York General Business Law, since that applies to defense attorneys and he acted as defense attorney. And "uniform rules" of compensation would not be accorded him if IDS's contention is upheld. Nor "like access to the courts of the country." Barbier v. Connolly, 113 U.S. 27, 31.

Judge Tenney misspoke himself when he stated that "those who represent themselves" do not have "a fundamental right" (MEMORANDUM, p.16,), since "the Founders believed that self-representation was a basic right of a free people." Faretta v. California, 422 U.S. 806, 830 n.39 (1975)

In the words of Mr. Justice Stewart:

"The recognition of the right of self-representation was not limited to the state-lawmakers. As we have noted, s 35 of the Judiciary Act of 1789, signed one day before the Sixth Amendment was proposed, guaranteed in the federal courts the right of all parties 'to plead and manage their own cause personally or by the assistance of...counsel.' See 1 Stat.92 (1789) as amended, 28 U.S.C. s 1654 (1970)." (422 U.S. at 830) (emphasis supplied)

There is nothing in the language of s 64 to show that "the New York legislature acted to relieve financial burdens (experienced by those who pay attorneys to represent themselves) but not experienced by the latter", i.e., "those who represent themselves". (MEMORANDUM, p.16) * As we have shown, Judge Tenney built this formulation on a dictum in Schwarz, supra, denying indemnification by a 4 to 3 vote of the Court of Appeals to a director who defended himself in a criminal proceeding and which found the statute extended only to a director's defense of himself in a civil proceeding. This result is irrelevant to the issues here.

* A "financial burden" of \$50,000 in debt had to be carried by Phillips, as we have already shown, as the result of the baseless Marchison suit (Alleghany Corp. v. Kirby) filed against him. (218 F.Supp.164)

"Attorneys' fees" as used in Section 64 fundamentally mean the number of hours served times the allowable hourly rate of pay. This formula applies to an attorney at law and an attorney pro se for the same legal services, the same legal success and the same right of compensation, pursuant to CPLR 105(c) and the Constitutional guarantee of Equal Protection of the Law.

It is obvious that no court can properly approve any "attorneys' fees" in a flat sum unsupported by details of the number of hours served and the dollar rate charged per hour. Thus "attorneys' fees" as used in the statute means basically the sum of the number of hours served times the allowable hourly rate of pay. Thus s 64 in the light of CPLR 105(c) and the Constitutional guarantee of Equal Protection of the Law require that the "attorneys' fees" of an attorney-at-law and an attorney pro se be calculated by the same formula for the same legal services, the same legal success and the same right of compensation.*

* CPLR 105(c) states: "The word 'attorney' includes a person prosecuting or defending an action in person." Judge Tenney ignored this inclusion.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part, "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Federal Government, as well as the States, are bound by the Equal Protection guaranty. Bolling v. Sharpe, 347 U.S. 497.

In construing s 64 of the N. Y. General Corporation Law Judge Tenney failed to apply the standards of either CPLR 105(c) or Equal Protection.

As stated by Judge Moore in City of Detroit v. Grinnell Corporation (2d Cir.1974), 495 F.2d 448:

"The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case." (p.470) And quoting Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, 487 F.2d at 167, "A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time, - taking account of the attorney's legal reputation and status." *

The "necessarily and actually incurred" requirement of Section 64.

The fees of an attorney-at-law and an attorney pro se are each "necessarily and actually incurred" in the same way, that is, they are based on the number of hours service necessarily and actually incurred to obtain the acquittal of the defendant represented, and the sum of the "fee" is obtained by multiplying those hours by the hourly rate of compensation approved by the court.

An attorney pro se is "subject to the heavy attorneys' fee characteristic of the defense of such actions" (Schwarz, supra) in the sense that he has made an equally heavy investment of his time as has the attorney-at-law. Equity requires that both be compensated for the equal amount of invested time necessarily and actually successfully expended in "the defense of such actions".

* This is all that Phillips as attorney pro se seeks here. Significantly, the award to him of \$60 per hour for 6800 hours of service in Zenn v. Anzalone, 46 Misc.2d 378, was agreed to by IDS's parent Alleghany.

The decision of Judge Weinfeld in Austrian v. Williams, 120 F.Supp.900 (SD.N.Y.) not only shows that reimbursement of a successful director defendant is "mandatory" under Section 64 of the New York General Corporation Law, but "This conclusion is reinforced" by the decision in Matter of Schwarz v. General Aniline & Film Corp., 305 N.Y.395 " (120 F.Supp. at 904-905, note 15)

There is no financial qualification test for indemnification in s 64, despite Judge Tenney's attempt to import one, since the statute plainly states that "Any person" (not only a financially burdened person) "made a party to any action, suit or proceeding by reason that he...is or was a director, officer, or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding...assessed against the corporation...upon court order" except in relation to matters in which he is adjudged liable for negligence or misconduct.

There is no room in this language for Judge Tenney's exclusion of a defendant director who successfully acted pro se.

"Sec. 64 declares that the successful defendant 'shall be entitled' to his reasonable expenses 'assessed against the corporation.' Further indicative of a design to exclude discretion is the exception in s 64 in relation to matters as to which it is adjudged the applicant is liable for negligence or misconduct.

* * * * *

The mandatory nature of the statute is perhaps revealed even more forcefully in s 67 which provides for reimbursement, not alone when the applicant is successful in whole or in part, but 'when the action against him has been settled with the approval of the court', as well. In either case, the Court 'shall' grant the application in the amount found by it to be reasonable and 'shall' make an Order directing judgment.

* * * These detailed and specific provisions bespeak, it seems to me, a legislative purpose to grant reimbursement in all cases, other than those specifically excepted by the terms of the Statute. Though Diamond v. Diamond, 200 Misc.1074, 108 N. Y. S. 2d 164 may not be binding upon me, its reasoning is sound analysis and supported by the history of the Statute. I therefore reach the conclusion that the Statute is mandatory and compels me, whatever my inclination might otherwise be, to grant the application made by defendants, who were officers and directors of the corporation.

" This decision is reinforced by a very recent decision of the New York Court of Appeals in Matter of Schwarz v. General Aniline & Film Corp., 305 N. Y. 395, 113 N. E. 2d 533." Austrian v. Williams, 120 F. Supp. 900, 904-905, emphasis supplied.

"(A) legislative purpose to grant reimbursement in all cases" certainly includes that of a successful defendant pro se, since he is not among "those specifically excepted by the terms of the Statute."

Judge Tenney's decision represents the bias of the licensed attorney, as shown by his failure to give judicial respect to CPLR 105(c).

The district court's omission of any reference in his MEMORANDUM to CPLR 105(c) is especially significant since Phillips' case is founded on it. See Horter v. DeMesa, 196 App. Div. 462 (1st Dep't)

III.

IN DENYING TO PHILLIPS THE BENEFIT OF THE
 NEW YORK GENERAL CORPORATION LAW SECTION 64
 BECAUSE HE CHOSE TO SPEAK IN COURT IN HIS
 OWN DEFENSE IN THE LITIGATION OF ALLEGHANY v.
KIRBY, THE DISTRICT COURT INFRINGED "HIS"
 CONSTITUTIONALLY PROTECTED INTERESTS -
 ESPECIALLY HIS INTEREST IN FREEDOM OF SPEECH."
PERRY v. SANDERMANN, 408 U.S. 593, 597 (1971)

In the federal courts the parties have a Constitutional and statutory right to self-representation. Faretta v. California, 422 U.S. 806, 830 n.39 (1975). To deny a person "a valuable governmental benefit (here N.Y. State's grant of indemnification) * * * on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech " is an "interference with constitutional rights" that "is impermissible." Perry v. Sandermann, 408 U.S. at 597.

Judge Tenney's construction of the indemnification statute is vulnerable on these constitutional grounds. For under it all other defendants' attorneys are paid for their time if successful in winning their case, while a defendant such as Phillips who has successfully acted as his own attorney, pursuant to his Constitutional and statutory right to do so, is denied such payment because he wrote and spoke in his own defense rather than through the speech of a licensed attorney. His exercise of his constitutional freedoms is thus "in effect * * * penalized and inhibited" (408 U.S. at 597), a clear violation of Sandermann.

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser v. Randall*, *supra*, unemployment benefits, *Sherbert v. Verner*, 374 U. S. 398, 404-405, and welfare payments, *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6; *Graham v. Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U. S. 75, 100; *Wieman v. Updegraff*, 344 U. S. 183, 192; *Shelton v. Tucker*, 354 U. S. 479, 485-486; *Torcaso v. Watkins*, 367 U. S. 488, 495-496; *Cafeteria Workers v. McElroy*, 367 U. S. 886, 894; *Cramp v. Board of Public Instruction*, 368 U. S. 278, 288; *Baggett v. Bullitt*, 377 U. S. 360; *Elfbrandt v. Russell*, 384 U. S. 11, 17; *Keyishian v. Board of Regents*, 385 U. S. 589, 605-606; *Whitchill v. Elkins*, 389 U. S. 54; *United States v. Robel*, 389 U. S. 258; *Pickering v. Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education*, *supra*, with *Shelton v. Tucker*, *supra*.

(408 U. S. at 597)

It would be sham to deny that New York State's indemnification of Phillips for his successful defense is being withheld for reasons consistent with his rights of "constitutionally protected speech". For, as we have shown, he has performed the same legal services with the same legal success as an attorney-at-law and is thus entitled to the same statutory compensation.

IV.

PLAINTIFF'S "REASONABLE EXPENSES * * * ACTUALLY AND NECESSARILY INCURRED BY HIM IN CONNECTION WITH THE DEFENSE" OF THE DERIVATIVE ACTIONS INCLUDED THE ACTUAL AND NECESSARY TIME EXPENDED BY HIM AS ATTORNEY PRO SE. *

Phillips' time is a compensable "expense"

BLACK'S LAW DICTIONARY (4th ed.) defines EXPENSE as follows:

"EXPENSE * * * the expenditure of time, labor and thought; the employment and consumption of time and labor * * * State v. DeWitt C. Jones Co., 180 Fla. 613, 147 So. 230, 233. * * * laying out or expending of money or other resources, as time or strength * * * In re Bates' Will, 152 Misc. 627, 274 N. Y. S. 93 * * *."

"Time" is thus a key factor in the reimbursement of "expenses." The statute explicitly refers to

§ 61. Assessment of expenses

Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties. Added L. 1925, c. 830, § 1, c. 2 April 18, 1925.

Thus reimbursement "in all cases" is "mandatory". Austrian v. Williams, supra.

* The argument here is based on the elimination of plaintiff's demand for "attorneys' fees" and relies instead on s 64's provision for the assessment of "expenses" based upon his expenditure of time in his successful defense.

The law of indemnification recognizes "loss of time" as compensable.

In addition to being a director of IDS Phillips was Chairman of its Finance & Law Committee and he was sued as such. (Murchison complaint, pars. 9, 41, 43, 53, 54, 60, 61, 62, 63, 64) (Bond affidavit, Exhibit C). As such an employee of the Board of Directors he has an "Employee's Right to Exoneration, Indemnity, and Reimbursement." Williston on Contracts, § 1016A, p. 115. "An employee, whether an agent or a servant, is entitled to be exonerated from, indemnified against or reimbursed for all necessary expenses, and for loss of time, (citing Bibb v. Allen, 149 U.S. 481 and other cases) incurred in his employment, based upon a fair apportionment of the risks of the employment in the light of business usages, the relationship of the parties, and the nature of the employee's undertaking..." (pp. 115-116) (emphasis supplied)

"An agent, compelled to defend a baseless suit, grounded upon acts performed in his principal's business, may recover from the principal the expenses of his defense." Admiral Oriental Lines v. United States, 86 F.2d 201, 202. (2 Cir. 1935). *

* Prayer (n) in the Murchison complaint made the "baseless" demand that this Court declare all "activities" of the IDS "sub-committee" (Finance & Law Committee) "unlawful and invalid."

The "Ordinary meaning of 'expense'" in judicial usage prior to the enactment of Section 64 included the meaning of "expending of...time".

In re Bates' Will (1934), 152 Misc. 627, 274 N. Y. S. 93, cited has an editor's note to that effect.

The statute does not define "expenses". Thus under the rules of statutory construction the ordinary and common usages of the word are to be applied. Among its primary usages are "the laying out or expending of money, or other resources, as time * * *" Funk & Wagnall's Standard Dictionary, (1930 ed). That the expenditure of "time" is a common and established usage of "expense" has been determined by the courts:

"No authority can be found to compel the limitation of the word 'expense' in the construction of this statute (a patent statute) to the 'expenditure of money'. It may, indeed, be defined as a 'disbursement of money', but it is as well 'the employment and consumption of time and labor'. " Matthews & Willard Mfg. Co. v. Trenton Lamp Co., 73 F. 212 215 (C. Ct. N. J.) (Emphasis supplied)

Also see: "It seems obvious that the key word in the interpretation of the section is 'expenses' * * *. The definition of the word 'expense' as contained in the Standard Dictionary is typical of the several other lexicographical statements which have been found "1. (1) The laying out or expending of money, or other resources, as time * * *" (Emphasis supplied). In re Hooker's Estate, 18 N. Y. S. 2d 107, 112.

The law of Restitution has long recognized the right to reimbursement for "the expenditure of time and effort to the benefit of another." Restitution, 50 New York Jur., s 1, pp.124-126.

In E.C. Warner Co., 232 Minn.207, 45 N.W.2d 388, the Supreme Court of Minnesota stated:

"Undoubtedly, the vindication of the integrity of the corporate management is in a certain general sense beneficial to the corporation from the standpoint of preserving the confidence of its creditors and of the prospective investors." (232 Minn.393; also see 257 Minn. at 366-7)

IDS at this time managed 4 publicly-owned mutual funds and financial companies with total assets of \$3 billion and some 1,000,000 shareholders. Thus had Phillips as an IDS director and Chairman of the Finance & Law Committee of the Board of Directors not successfully defended against the charges levied at him such a result could have had a serious effect on these 1,000,000 shareholders.

To deny Phillips reimbursement in these circumstances for his successful expenditure "of time and effort to the benefit" of IDS in preserving "the confidence of the creditors and of the prospective investors" was a purely arbitrary act of the district court and unexplained in its MEMORANDUM.

V.

JUDGE FRANKEL LACKED JURISDICTION TO VACATE
BY HIS OPINION AND ORDER OF JUNE 15, 1972 THE
DEFAULT JUDGMENT ENTERED AGAINST ALLEGHANY
CORPORATION ON MAY 12, 1972.

- A. The filing by defendant Alleghany Corporation of its June 8, 1972 Notice of Appeal "divested (the district court) of jurisdiction, except to take action in aid of the appeal until the case is remanded to it by the appellate court." 7 Moore's Federal Practice, par. 60.30(2), p. 419.

Thus Judge Frankel had no jurisdiction to enter his order of June 15, 1972, vacating plaintiff's default judgment.

- B. The rule stated in 7 Moore's Federal Practice, supra, is uniformly applied throughout all the circuits, including the Second Circuit.

On May 15, 1972 Alleghany moved, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the default judgment. (). The motion

* At the time of the entry of the Default Judgment Alleghany Corporation was the only party defendant that had been served with the summons and complaint, this having occurred on April 20, 1972. (2a) Counsel Richard Bond in an affidavit filed with Judge Gurfein on June 8, 1972 stated defendant IDS was served on May 19, 1972. Thus when the Default Judgment was entered on May 12, 1972 this was not a multiparty case and it was proper to enter the Default Judgment against the served defendant. Ferguson v. Bartels Brewing Co. (Pa.), 284 F.2d 855 (2 Cir. 1961).

was made returnable before Judge Frankel. On June 8, 1972 Alleghany filed its Notice of Appeal from the default judgment. (51a). As Judge Friendly stated in Weiss v. Hunna, 312 F.2d 711 (2 Cir.1963), cert.den. 374 U.S. 853 (1963), the filing of a Notice of Appeal divests the district court of jurisdiction to grant or deny relief under Rule 60(b).

" * * * we will assume that it could properly have been entertained after that period as a motion under Rule 60(b) based on 'newly discovered evidence' or on 'any other reason justifying relief from the operation of the judgment.' * * * But once plaintiff had filed a notice of appeal, the district court was divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b) except with our permission. Freedman v. Overseas Scientific Corp., 150 F.Supp. 394 (S. D. N. Y. 1957); Ritter v. Hilo Varnish Corp., 186 F.Supp. 625 (S. D. N. Y. 1960); Daniels v. Goldberg, 8 F.R.D. 580 (S. D. N. Y. 1948), aff'd 173 F.2d 911 (2 Cir. 1949); 7 Moore, Federal Practice (2d ed. 1953), at 335-338." (emphasis supplied)

There is no record of any application by Alleghany to this Court for permission to have the district court act on its Rule 60(b) motion after it filed its June 8, 1972 notice of appeal.

In Daniels v. Goldberg, 8 F.R.D. 580 (S. D. N. Y.), Judge (now Chief Judge) Kaufman ruled that a district court has no "power to vacate a judgment after an appeal has been filed." In this connection he pointed out that "an appeal is perfected by filing a proper notice of appeal, and the filing of that notice vests jurisdiction of the case in the appellate court."

In Keohane v. Swarco, 320 F.2d at 432 (6 Cir.1963, the Court of Appeals stated:

"(4) The taking of the appeal even though from an interlocutory order nevertheless transferred jurisdiction to the Court of Appeals. The orders entered by the District Court on January 16th, March 6th and March 14, 1963 were null and void since that court was without jurisdiction to make them after the appeal had been taken. Merritt-Chapman & Scott Corporation v. City of Seattle, 281 F.2d 393 (CA 9); United States v. Frank B. Killian Co., 269 F.2d 491 (CA 6); Hirsch v. United States, 15 F.2d 524 (CA 3)" (emphasis supplied) 320 F.2d at 432.

Because of the fact the record is barren of any permission being granted Alleghany by the Second Circuit to move under Rule 60(b) to vacate the Default Judgment after it filed its June 8, 1972 notice of appeal, Judge Frankel's order dated June 15, 1972 is "null and void" for lack of jurisdiction beyond a shadow of a doubt in view of the unanimity of the authorities.

- C. Under the standards of the Second Circuit Judge Tenney abused his discretion, in failing to follow the above cases cited to him by plaintiff_____

"In this case, as in all others, the district court is required to follow a binding precedent of a superior court, and it abused its discretion in declining to do so." U.S. ex rel. Schnitzler v Follette, 406 F.2d at 322. (2 Cir. 1967)

The above "binding precedents" required Judge Tenney to declare the June 15, 1972 order "null and void" and he abused his discretion "in declining to do so."

D. Since the judgment is a "nullity" it "may be vacated by the court which rendered it at any time." 7 MOORE'S FEDERAL PRACTICE, par. 60. 25(4), pp. 314-315.

Moore cites United States v. Sotis (7 Cir. 1942), 131 F. 2d 783, 787, and United States v. Milana (ED Mich. 1957), 148 F. Supp. 152. As Judge Learned Hand said in Larsen v. Wright & Cobb Lighterage Co., (2 Cir. 1948), 167 F. 2d 320,

E. There is no merit to Alleghany's argument that the failure of plaintiff to complete his appeal from Judge Frankel's order of June 15, 1972 deprives him of the right to move for relief therefrom under Rule 60(b)(4), of the Federal Rules of Civil Procedure.

"If a civil judgment is void the party aggrieved need not appeal, but may move to set aside the judgment under 60(b)(4)." 7 MOORE'S FEDERAL PRACTICE, par. 60. 25(3), pp. 312-313. *

Moore cites Winhoven v. United States, 201 F. 2d 174 (9 Cir. 1952), which is based on Sunal v. Large, 332 U. S. 174, 182 and Escue v. Zerbst, 295 U. S. 490, 491.

* This is precisely what Phillips did, only to have his motion under Rule 60(b)(4) denied by Judge Tenney on the ground that Judge Frankel's decision was "the law of the case" in the district court. (132a-133a)

F. Alleghany Corporation, having invoked the jurisdiction of the district court under Judge Frankel to vacate the Default Judgment of May 12, 1972 and then while its motion was pending, having appealed on June 8, 1972 to this Court and then while the appeal was pending, having procured on its own motion a dismissal of the appeal, has waived all objections to the Default Judgment, making it a final and subsisting Judgment.

"A judgment of a court having jurisdiction of the parties and the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained on default." Riehle v. Margolies, *supra*, p. 225. "Morris v. Jones, 329 U.S. 545, 550-551.

" * * * failure to pursue the adequate and available legal remedy of appeal" is "a sufficient basis for the denial of any equitable relief from the default judgment." Winfield Associates, Inc. v. Stonecipher, 429 F.2d 1037, 1091 (10 Cir. 1970); Ira S. Bushey & Sons, Inc. v. W. E. Hedger Transp. Corp., 167 F.2d 9, 18 (2 Cir. 1948).

" * * * If the District Court had erred in dealing, or in failing to deal with any issue thus involved, the remedy was by appeal and no appeal was taken." Jackson v. Irving Trust Co., 311 U.S. at 499-500.

"Defendant had 30 days in which to appeal to this court from that decision. He did not do so. The issue of the default judgment must therefore be taken as settled in this case." Pulliam v. Pulliam, 478 F.2d at 937. (D.C. Cir. 1973)

- G. All courts, whether trial or appellate,
recognize the duty to vacate void orders
or judgments on notice thereof.

Judge Learned Hand said in Larsen v. Wright & Cobb Lighterage Co., (2 Cir. 1948), 167 F. 2d 320:

" * * * a judgment is always open to attack when the court lacks jurisdiction over the subject matter." (322)

In Pistorino & Co. v. United States, the Court of Claims stated

" * * * It is well settled that a void act or judgment may be attacked in any judicial tribunal, in any other cause, at any time the question arises." (333 F. Supp. at 545)

The Sixth Circuit stated in Berry v. Allen, 411 F. 2d at 1146 (1969),

"Any individual, moreover, may challenge a void judgment when it is asserted against him."

Judge Weinfeld stated In Re Stern, 235 F. Supp. 682,

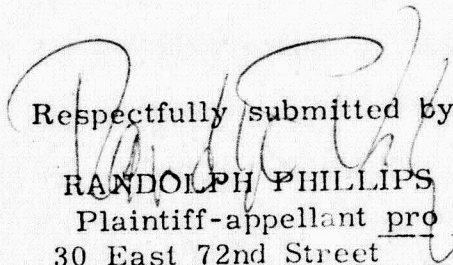
" They are entitled to an order of vacatur in the very proceeding in which the void order and process were issued. An order or decree issued by a Court beyond its authority and with respect to a person over whom it has no jurisdiction should not be allowed to stand. To grant such relief offends no principle of res judicata or collateral estoppel." (683)

Finally, the Supreme Court of the United States in In re Sawyer,
124 U. S. at 221 stated,

"The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void."

CONCLUSION

1. The Opinion & Order of Judge Frankel dated June 15, 1972 vacating the Default Judgment of May 12, 1972 against defendant Alleghany Corporation should be reversed for lack of jurisdiction when entered.
2. The Memorandum decision of Judge Brieant entered on September 25, 1972 dismissing the complaint against Alleghany should be reversed for lack of jurisdiction and on the ground of res judicata. Its entry for lack of diversity should be reversed by reason of the existence of ancillary jurisdiction if the prior mentioned relief is not accorded plaintiff.
3. The dismissal of the amended complaint against defendant IDS should be reversed.
4. If the case continues defendant IDS should be instructed to proceed by counsel not selected by Phillips' former counsel at the Donovan Leisure Newton & Irvine law firm.


Respectfully submitted by

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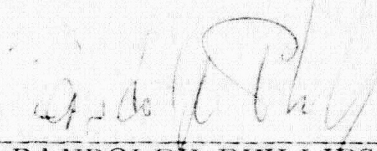
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March 31, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have today served 2 copies of Plaintiff-Appellant's Brief and one copy of the Joint Appendix in the foregoing appeal upon Richard L. Bond, Esq., attorney for defendants-appellees by leaving copies of the same at said attorney's offices at 430 Park Avenue, New York, N.Y.


RANDOLPH PHILLIPS

March 31, 1977